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IN THE

Supreme Court of the United States

October Term, 1970.

No. 1192

NEW YORK CENTRAL RAILROAD COMPANY, a Delaware Corporation, n/k/a PENN CENTRAL TRANSPORTATION COMPANY (Debtor in Reorganization), a Pennsylvania Corporation,

Petitioner,

against

WINIFRED FISHER, as Administratrix of the Estate of HENRY FISHER, Deceased,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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Table of Contents.

	Page
Questions Presented	1
Statement of the Case	2
The Factual Context	3
The Court's Charge	5
The writ should be denied	6
None of the issues raised fall within the ambit of Rule 19, Supreme Court Rules, warranting consideration by this court	6
A. Neither *American Trucking v. A.T. & S.F.R. Co.*, 387 U. S. 397; *Edwards v. Pacific Fruit Express Co.*, 390 U. S. 538, nor *McCrea v. Harris County Houston Ship Channel Nav. Dist.*, 423 F. 2d 605, is inconsistent with the determination made here	6
B. The decision below is not in conflict with any pertinent holding of a companion Court of Appeals or any State Supreme Court	7
C. The discretionary refusal of the District Court to admit evidence of application for and receipt of Workmen's Compensation benefits not only is in accord with authority in this court, but is likewise in accord with and not contrary to applicable Court of Appeals decisions	10
D. Certiorari is not warranted in this case	12
Conclusion	13

TABLE OF CASES.

Page

American Trucking v. A.T. & S.F.R. Co., 387 U. S. 397 6

Baker v. Texas and Pacific Railway Co., 359 U. S. 227 ..... 7, 12

Baltimore & O.S.W.R. Co. v. Burtch, 44 S. Ct. 165 7

Bretsky v. Lehigh Valley Railroad Co., 156 F. 2d 594 10

Cimorelli v. New York Central Railroad Co., 148 F. 2d 575 10

DeMaree v. Pennsylvania Railroad Co., 147 F. Supp. 656 11

Dennison v. Payne, 293 F. 333 10

Edwards v. Pacific Fruit Express Co., 390 U. S. 538 6

Edwards v. Pacific Fruit Express Co., 290 U. S. 538 11

Fawcett v. Missouri Pacific R.R. Co., 242 F. Supp. 675, aff'd 347 F. 2d 233, cert. den. 382 U. S. 907 ..... 8, 9, 12

Hoffman v. New York N.H. & H.R. Co., 74 F. 2d 227, cert. den. 294 U. S. 715 10

McCrea v. Harris County Houston Ship Channel Nav. Dist., 423 F. 2d 605 6

Page

Pennsylvania Railroad Co. v. Roth, 160 F. 2d 161 10

Pennsylvania Railroad Co. v. Barlion, 172 F. 2d 710 10

Phelps v. M.K.T.R. Co., Mo. , 438 S.W. 2d 181 ..... 7, 8, 12

Rogers v. Missouri Pacific R.R., 352 U. S. 500 12

Schroeder v. Pennsylvania Railroad Co., 367 F. 2d 452 ..... 9, 10

Smith v. Norfolk & Western Railway Company, 407 F. 2d 501 7

Tipton v. Socony Mobil Oil Co., 375 U. S. 34 11

Turpin v. Chicago, Burlington & Quincy R.R. Co., Mo. , 403 S.W. 2d 233 ..... 7, 8

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Petitioner,

against

WINIFRED FISHER, as Administratrix of the Estate of Henry Fisher, Deceased,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

Questions Presented.

1. Is certiorari warranted to review either (a) the propriety of submission to jury consideration of the issue of respondent's intestate's status as an employee of petitioner for Federal Employer's Liability Act purposes, or (b) the jury's finding, upon a sifting and evaluation of the factual data presented to it, of the existence of such relationship?

2. Is certiorari warranted to review the discretionary refusal of the District Court to permit evidence that respondent, in her capacity as widow, and not as legal rep-

resentative of the estate of her deceased husband, applied for and received New Jersey Workmen's Compensation benefits, in the face of the clear concession made by respondent upon the trial that her intestate had been employed "of record" by one of petitioner's wholly-owned subsidiary corporations?

Statement of the Case.

The amended complaint claims jurisdiction based upon the Federal Employer's Liability Act (hereinafter FELA) and predicates liability upon the claim that respondent's decedent, while employed "of record" by New York Central Transport Company (hereinafter Transport) was either (a) in fact the employee of petitioner (hereinafter Railroad) at the time of the occurrence, and/or (b) was, in legal effect, such employee by virtue of the inter-corporate relationship between Railroad and Transport.

Railroad's answer denies the material allegations of the amended complaint and further pleads affirmatively an absence of the employment relationship between respondent's decedent and Railroad, and that the application for and receipt of Workmen's Compensation benefits from the State of New Jersey by respondent on behalf of herself and her children constituted an election of remedies barring the action.

The District Court submitted all issues, including the issue of the decedent's status as employee or not of Railroad, to the jury. The verdict rendered was in favor of respondent, and substantial monetary damages were awarded. The Circuit Court affirmed from the bench.

The Factual Context.

Commencing in 1948, Railroad conducted operations as a common carrier by motor vehicle pursuant to I.C.C. certificates granted it permitting such operations. Early in 1960, there was consummated a transfer of these I.C.C. certificates by Railroad to Transport. The interstate motor vehicle operations of Transport have since been conducted solely by virtue of such transferred operating rights, and Transport is enjoined by the terms of those certificates to conduct its operations solely in a manner which is auxiliary and supplemental to the rail service of Railroad. The hallmark of such service is the rendering of the same by a railroad-affiliated motor carrier in a subordinate capacity for the purpose of assisting the railroad in its rail operations. No consideration was paid by Transport to Railroad for the transfer of these operating rights.

From the time of Transport's incorporation to the date of accident, Railroad owned all of the outstanding stock of Transport, for which it paid the sum of $1,000. Railroad made loans to Transport since incorporation of some $2.6 million, none of which was repaid although Transport has a current net worth of almost $9 million and has operated at a profit ever since its incorporation. The majority of the Board of Directors of Transport has at all times been composed of persons who are similarly officers or directors of Railroad.

In connection with a proceeding brought before the Interstate Commerce Commission by Transport (in which it was represented by Railroad's attorney) for the purpose of removing certain key-point restrictions on the operations of Transport, the adverse economic effects of those restrictions upon Railroad's operations was given as the basis for the requested relief, and the proposal to elimi-

nate the key-point restrictions was made by Railroad for the purpose of furthering Railroad's rail service and subordinating Transport's operations to it.

Railroad and Transport maintain their central offices in contiguous buildings and all other offices of Transport for the conduct of its business are located at terminals or yards owned by Railroad. All of Transport's business operations, insofar as rail lines are utilized, run solely on Railroad's lines.

Transport maintains no offices for the solicitation of freight business whatever; all advertising for freight on behalf of Transport is conceived, placed and paid for by Railroad; similarly, Railroad, not Transport, bears all traffic expenses; Railroad, not Transport, prepares the bills and collects the charges for the freight shipped; and Railroad, not Transport, publishes all tariffs under which the traffic moves. Transport services only those geographic locations serviced by Railroad, and Transport maintains no freight terminals of its own.

The frequency and extent of Transport's operations depend solely on Railroad's needs and are determined solely by Railroad. Railroad's executive vice president stated unequivocably that Railroad controlled Transport, and Railroad's attorney (in the aforementioned I.C.C. proceeding) characterized the relationship between Railroad and Transport as that of master and servant.

More than 50% of Transport's equipment consists of Flexi-vans, and more than 90% of Transport's business involves the use of Flexi-vans. The equipment is purchased by Transport from another wholly-owned subsidiary of Railroad, Strick Corporation, and all of said equipment is informally (and orally) leased by Transport to Railroad.

Railroad's "logo," which appears on the Flexi-vans, is a symbol used by Railroad only in connection with its railroading activities.

While many of Railroad's employees belong to the so-called Brotherhood Unions, many others do not.

At various points along its rail lines, Railroad's own employees perform all of the loading and unloading from Transport's equipment, while at other points Railroad employees ("car knockers") inspect the equipment both before and after loading and, on occasion, assist in the physical labor of the operation.

It was stipulated by Railroad's attorneys upon the trial that the work done by respondent's decedent at the time of the accident directly or closely and substantially affected interstate commerce. It was further stipulated that respondent's decedent's co-workers, involved in the incident, were to be deemed to have the same status, as employees of Railroad or not, as did plaintiff's decedent.

With respect to the Workmen's Compensation benefits issue, the application therefor was made by respondent in her capacity as wife (widow) of decedent. No proof was tendered by Railroad to indicate whether or not the issue of employment was litigated before the Workmen's Compensation Board; in fact, in its brief before the court below, as in its petition here, Railroad asserts that in connection with the preceeding there was "no contest."

The Court's Charge.

The court charged that the essential determination required of the jury was whether or not Transport was a separate, independent corporation or merely an agent, branch, or department of Railroad set up in corporate form. The court also charged, even absent a deter-

mination that there was such intercorporate relationship that respondent's decedent might still be an employee of Railroad if the jury found that there was the requisite degree of control over the details of decedent's work, not merely the results thereof, so as to constitute him such employee.

No objection was taken by Railroad to this statement of governing law.

The writ should be denied.

None of the issues raised fall within the ambit of Rule 19, Supreme Court Rules, warranting consideration by this court.

A. Neither *American Trucking v. A.T. & S.F.R. Co.*, 387 U. S. 397; *Edwards v. Pacific Fruit Express Co.*, 390 U. S. 538, nor *McCree v. Harris County Houston Ship Channel Nav. Dist.*, 423 F. 2d 605, is inconsistent with the determination made here.

The emphasis petitioner places upon the "trucking" nature of what this court has characterized as a bimodal form of transportation fails completely to take account of the fact that, by whatever name applied to it, the work done by respondent's decedent was stipulated by petitioner to "directly or closely and substantially" affect interstate commerce. The mere fact that the decedent's labor was performed in an industry characterized as involving a bimodal form of transportation does not, we concede, in and of itself suffice to make him an employee of Railroad. But by the same token, such fact does not preclude his being so considered, if facts are presented from which a jury could determine that, in the particular instance, and as the result of the intercorporate arrange-

ments made between his "of record" employer and Railroad, he was indeed Railroad's employee.

Neither *Edwards* nor *McCrea* give comfort to Railroad, since it is conceded and recognized by Railroad that in those cases it was the "of record" employer that was held not to be a common carrier by railroad for FELA purposes. The issue here is far different. In discussing these cases, at page 13 of its petition, Railroad seems to argue that, even if respondent's decedent were deemed to be an employee of Railroad, still the work he did would not afford him the benefits of FELA (citing *Smith v. Norfolk & Western Railway Company*, 407 F. 2d 501, as authority for the proposition that such labor is traditionally not a railroad responsibility). Whether a railroad is "responsible" for loading and unloading or not misses the mark completely. Even absent the stipulation above-noted, it is far too late in the day to question settled doctrine that such labor, by whomsoever performed, and by whatever appellation ("trucker" or otherwise) utilized to describe the performer, involves the performer in work which "directly or closely and substantially" affects commerce (*Baltimore & O.S.W.R. Co. v. Burtch*, 44 S. Ct. 165).

B. The decision below is not in conflict with any pertinent holding of a companion Court of Appeals or any State Supreme Court.

Neither *Phelps v. M.K.T.R. Co.*, Mo. , 438 S. W. 2d 181, nor *Turpin v. Chicago, Burlington & Quincy R.R. Co.* Mo. , 403 S. W. 2d 233, is inconsistent with the result reached below. In each of the cases cited, it was recognized that the issue of employment was, as mandated by this court's decision in *Baker v. Texas and Pacific Railway Co.*, 359 U. S. 227, an issue of fact. All that

Phelps and *Turpin* decided was that, considering the evidence in the respective cases, the presentation made did not rise to the diginity of a genuine issue of fact warranting jury determination. In the case *sub judice*, the District Court reached a contrary conclusion, a conclusion upheld by the determination of the Court of Appeals that the factual presentation indeed raised questions for jury consideration.

We would point out, in passing, that the charge on the law by the District Court here, to which no objection was taken by Railroad, permitted the jury to find that Transport was in reality the alter ego, agent, branch or a department of Railroad set up in corporate form, and not an independent organization. The applicability of this statement of law to the case, even disregarding the fact that Railroad did not object thereto and thus cannot raise the point on appeal, was recognized in *Turpin* itself, where one finds the following:

> "In the absence of fraud, connivance *or an undue domination*, the law recognizes the separate entities of corporations, even though one owns the stock of another; this principle is applicable in solving questions of employment, as here. Nor is the one *for that reason*, the alter ego of the other." (Italics added.)

It was precisely the evidence presented in this case of such "undue domination" which created a fact issue appropriate for jury determination.

Fawcett v. Missouri Pacific RR. Co., 242 F. Supp. 675, aff'd 347 F. 2d 233, cert. den. 382 U. S. 907, is but another example of the rule that issues which are normally factual may, in any given instance, be subject to disposition as a matter of law. In this case, a motion for summary judgment, made by defendant, was granted. The rationale of such grant was the finding by the trial court

of the absence of a genuine issue of fact. The determination was based upon the argument pressed by the plaintiff that because—and only because—"the trucking company is a wholly owned subsidiary of the defendant, it, the trucking company was the alter ego, adjunct, subsidiary agent, and instrumentality of the railroad" (242 F. Supp. at p. 677). On a factual basis, the material presented in *Fawcett* fell far short of the material presented here, which both the District Court and Circuit Court of Appeals have found presented real factual issues concerning the domination of Transport by Railroad. Thus, to argue as petitioner here does, that the determination reached here is in conflict with that reached in *Fawcett*, is to argue for a distinction without a difference, since both courts adopted and recognized the basic principles involved, reaching different conclusions only because of the dissimilarity of the facts involved in each case.

Schroeder v. Pennsylvania Railroad Co., 367 F. 2d 452, of course, is four-square with the instant case, and fortifies the result reached here. The analysis of this case by Railroad in its petition, however, deserves comment.

The distinction drawn by Railroad seems to be that in *Schroeder* no affiliate of a Railroad was involved, but rather an independent contractor who permitted so much control of its operations to be taken over by the railroad so as to raise a jury question under the doctrine noted. If Railroad seeks to make a distinction between a railroad "affiliate" (a term, we assume, Railroad employs to characterize a wholly-owned subsidiary) and an organization not so "affiliated," we fail to find any logic in or forcefulness to such argument. Railroad seems to concede that it is acceptable for a jury to pass upon the question of whether or not a railroad has so controlled the operations of an otherwise independent contractor as

to render that organization an adjunct of the railroad (for which *Cimorelli v. New York Central Railroad Co.*, 148 F. 2d 575; *Pennsylvania Railroad Co. v. Roth*, 160 F. 2d 161, and *Pennsylvania Railroad Co. v. Barlion*, 172 F. 2d 710, is impeccable authority) but that it is impermissible to do so where an "affiliate" of a railroad is involved. It would seem to us that the latter is an *a fortiori* case. In either instance, the ultimate conclusion—that the degree of control exercised by the dominant organization negates any possibility of independent action by the subservient one—makes applicable the rule of law governing cases such as this.

C. The discretionary refusal of the District Court to admit evidence of application for and receipt of Workmen's Compensation benefits not only is in accord with authority in this court, but is likewise in accord with and not contrary to applicable Court of Appeals decisions.

Railroad does not question—as, indeed, it could not—that the procedure followed here relative to the exclusion of Workmen's Compensation evidence is in direct accord with the procedure followed in *Schroeder*. Instead, petitioner urges, in a strained attempt to come within the scope of Rule 19, that the Fifth Circuit permitted evidence of Workmen's Compensation. *Dicks v. Cleaver*, cited by Railroad at its page 15, has literally no bearing here. That case is wholly dissimilar, and the issue there presented is not even remotely pertinent here. The application for and acceptance of Workmen's Compensation benefits by respondent, on behalf of herself and her children, does not constitute an election of remedy barring institution of an action under FELA (*Dennison v. Payne*, 293 F. 333; *Hoffman v. New York N.H. & H.R. Co.*, 74 F. 2d 227, cert. den. 294 U. S. 715; *Bretsky v. Lehigh*

Valley Railroad Co., 156 F. 2d 594; *DeMarco v. Pennsylvania Railroad Co.*, 147 F. Supp. 656). Moreover, in the case at bar, the parties to the Workmen's Compensation proceeding not only were different (Railroad not even being a party to the proceeding, and respondent presenting her claim as widow and not as legal representative of her decedent's estate), but there is a total absence of any showing that the issue of employment was actually litigated so as to bring into play the doctrine of *res judicata*. Moreover, we urge that there cannot possibly be any probative worth assigned to the extrajudicial assertion by decedent's widow that her late husband was employed by Transport in the face of the stated concession made upon the trial that Transport was his "of record" employer, particularly in light of this court's recognition of the gross prejudice resulting from permitting similar evidence to be introduced against a complainant who himself (not even representatively) makes similar assertion (*Tipton v. Socony Mobil Oil Co.*, 375 U. S. 34). The sole and only purpose of such evidence would be to prejudice the trier of the facts against respondent, and the District Court's refusal to allow such evidence was not only appropriate, but certainly could not be characterized as an abuse of discretion of such magnitude as to warrant review by this court.

The argument advanced by petitioner with respect to *Edwards v. Pacific Fruit Express Co.*, 290 U. S. 538, is without merit. That case held simply that Workmen's Compensation benefits were properly obtainable by a claimant *because* FELA did not apply, and not the converse, viz; that FELA was inapplicable *because* Pacific Fruit's employees received Workmen's Compensation benefits.

D. Certiorari is not warranted in this case.

Railroad seeks to have this court review what is nothing more nor less than a simple factual issue (see dissenting opinion of Mr. Justice Frankfurter in *Rogers v. Missouri Pacific RR.*, 352 U. S. 500). Railroad seeks to frame the issue as one involving a determination of whether the employees of a trucking affiliate of a railroad, involved in a bimodal form of transportation, should look for redress for injury under state compensation laws or FELA. That, simply, is not the issue. If, as in *Fawcett*, the claim here advanced was that the fact of such affiliation alone sufficed to bring the affiliate's employees under FELA, there might then be merit to Railroad's position. However, given this case, where the facts present real and genuine issues for jury determination as to whether or not an affiliate was so dominated by its parent company as to render its operations in reality those of its parent, we respectfully submit that there is no special or important reason for granting certiorari. Indeed, the only similar case which our research has uncovered in which this court has granted certiorari is *Phelps* where, following a jury verdict for plaintiff, there was ultimate reversal as a matter of law and direction of a verdict for the defendant. Under these circumstances, the grant of certiorari is understandable, in view of the command in *Baker* that FELA issues of employment ordinarily be decided as questions of fact. Here that issue has been so decided and, we respectfully submit, nothing more remains for review.

Conclusion.

For the reasons above set forth, the petition should be denied.

January 11, 1971.

Respectfully submitted,

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